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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

D2

[REDACTED]

DATE: **JAN 09 2012** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

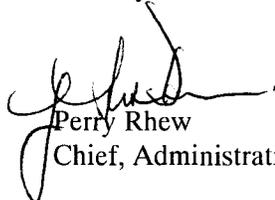
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**INSTRUCTIONS:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

  
Perry Rhew

Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will remain denied.

The petitioner represented itself on the Form I-129 as an audio visual services firm with 1,400 employees. It seeks to employ the beneficiary as a senior sales engineer pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition on the basis of his determination that the petitioner had failed to demonstrate that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request for additional evidence; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review of the entire record, we find that the petitioner has failed to overcome the director's ground for denying this petition. Beyond the decision of the director, we find additionally that the petitioner has failed to demonstrate: (1) that the petition is supported by a certified labor condition application (LCA) that corresponds to it; and (2) that the beneficiary qualifies to perform the duties of a specialty occupation.

*The Proposed Position Does Not Qualify For Classification As A Specialty Occupation*

The first issue before us on appeal is whether the proposed position qualifies for classification as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [1] theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires [2] the attainment of a bachelor's degree or higher in a

specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5<sup>th</sup> Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its

equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

In its October 16, 2009 letter of support, the petitioner stated that the duties of the proposed position would include the following tasks:

- Serving as an expert engineer on the petitioner's technologically and scientifically customized technology;
- Using his engineering skills to demonstrate to potential customers how and why the petitioner's product lines will suit them better than competitors' products;
- Helping existing customers solve technical problems with the petitioner's equipment;
- Identifying emerging opportunities and competitive threats;
- Analyzing customers' business issues and market dynamics;
- Securing maximum amounts of audio visual revenue through direct sales with new and existing clients;
- Working closely with the petitioner's project managers when consulting with clients about their selection, reservation, and acquisition of audio visual equipment and services;
- Using customized meeting diagrams, proprietary software packages, and marketing materials to create and deliver sales presentations detailing equipment, services, and labor price estimates;
- Attending site inspections and pre- and post- event meetings;
- Developing and maintaining relationships with the petitioner's team members at event destinations;
- Ensuring that customers receive outstanding services in a partnership designed to accomplish their objectives;
- Following up with clients through thank you letters and post event service evaluations;
- Establishing and maintaining sales files to track all future bookings; and
- Training and mentoring sales team members, including the creation of individual sales development plans.

Counsel offered further elaboration upon these duties in his November 29, 2009 letter submitted in response to the director's October 30, 2009 request for additional evidence, and stated that the beneficiary would require "only nominal supervision." Counsel referred to the proposed position as both a sales engineer and, alternatively, a sales manager. For example, although counsel stated that "[t]he position of Sales Engineer is professional in nature," he argued on two separate occasions that the "the Beneficiary is clearly a Sales Manager," and referred to the position as a "Senior Sales Manager" multiple times.

In making our determination whether the proposed position qualifies as a specialty occupation, we turn first to the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by

the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which we routinely rely for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

We agree with counsel's apparent argument that the duties of the proposed position combine those of sales managers and sales engineers, as those occupations are discussed in the *Handbook*. In its entry for sales managers, which is contained within its discussion of advertising, marketing, promotions, and sales managers, the *Handbook* states, in pertinent part, the following:

*Sales managers.* Sales managers direct the distribution of the product or service to the customer. They assign sales territories, set sales goals, and establish training programs for the organization's sales representatives . . . Sales managers advise the sales representatives on ways to improve their sales performance. In large multiproduct firms, they oversee regional and local sales managers and their staffs. Sales managers maintain contact with dealers and distributors, and analyze sales statistics gathered by their staffs to determine sales potential and inventory requirements and to monitor customers' preferences. Such information is vital in the development of products and the maximization of profits.

*Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos020.htm> (last accessed December 21, 2011). The *Handbook* states the following with regard to the duties of sales engineers:

Many products and services, especially those purchased by large companies and institutions, are highly complex. *Sales engineers*—also called *technical sales support workers*—determine how products and services could be designed or modified to suit customers' needs. They also may advise customers on how best to use the products or services provided.

Sales engineers specialize in technologically and scientifically advanced products. They possess extensive knowledge of these products, including knowledge about their components, functions, and the scientific processes that make them work. They use their technical skills to explain the benefits of their products to potential customers and to demonstrate how their products are better than the products of their competitors. Often, they modify and adjust products to meet customers' specific needs. Some sales engineers work for the companies that design and build technical products, while others work for independent sales firms.

Many of the duties of sales engineers are similar to those of other salespersons. They must interest the client in purchasing their products, negotiate a price, and complete

the sale. Some sales engineers, however, are teamed with other salespersons who concentrate on marketing and selling the product, enabling the sales engineer to concentrate on the technical aspects of the job. By working on a sales team, each member is able to focus on his or her strengths and expertise. . . .

Sales engineers tend to employ selling techniques that are different from those used by most other sales workers. They generally use a "consultative" style; that is, they focus on the client's problem and show how it can be solved or mitigated with their product or service. This selling style differs from the "benefits and features" method, whereby the salesperson describes the product and leaves the customer to decide how it would be useful.

In addition to retaining current clients and attracting new ones, sales engineers help clients solve any problems that arise when the product is installed. Afterward, they may continue to serve as a liaison between the client and their company. Increasingly, sales engineers are asked to undertake additional tasks related to sales, such as market research, because of their familiarity with clients' purchasing needs. Drawing on this same familiarity, sales engineers may help identify and develop new products.

*Id.* at <http://www.bls.gov/oco/ocos123.htm>. As noted, we agree with counsel's apparent argument that the duties of the proposed combine those of sales managers and sales engineers. Having made that determination, we turn next to the *Handbook's* discussion of the qualifications necessary for entry into these fields. With regard to the education and training requirements for sales managers, the *Handbook* states the following:

A wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales manager jobs, but many employees prefer college graduates with experience in related occupations. . . .

For marketing, sales, and promotions management positions, employers often prefer a bachelor's or master's degree in business administration with an emphasis on marketing. Courses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous. In addition, the completion of an internship while the candidate is in school is highly recommended. In highly technical industries, such as computer and electronics manufacturing, a bachelor's degree in engineering or science, combined with a master's degree in business administration, is preferred.

\* \* \*

Most advertising, marketing, promotions, public relations, and sales management positions are filled through promotions of experienced staff or related professional personnel. For example, many managers are former sales representatives; purchasing agents; buyers; or product, advertising, promotions, or public relations specialists. In small firms, in which the number of positions is limited, advancement to a

management position usually comes slowly. In large firms, promotion may occur more quickly.

*Id.* at <http://www.bls.gov/oco/ocos020.htm>. Although a bachelor's degree in business administration may be preferred, the *Handbook* does not indicate that a minimum of a bachelor's degree in a specific specialty is normally required for sales managers. The *Handbook* states the following with regard to entry as a sales engineer:

A bachelor's degree in engineering usually is required for a person to become a sales engineer. However, workers without a degree, but with previous experience in sales and technical experience or training, sometimes hold the title of sales engineer. Also, workers who have a degree in a science, such as chemistry, or even a degree in business with little or no previous sales experience, may be called sales engineers.

*Id.* at <http://www.bls.gov/oco/ocos123.htm>. Although the *Handbook* indicates that sales engineering positions usually require a bachelor's degree in engineering, it also states clearly that individuals with degrees in business, and even individuals who lack a degree altogether, can hold sales engineering positions. The *Handbook*, therefore, does not support a finding that a minimum of a bachelor's degree *in a specific specialty* is normally required for sales engineers.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proposed position's title. The specific duties of the position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

As discussed, we have determined that virtually all of the proposed position's duties are listed in the *Handbook* among the occupations of sales managers and sales engineers. However, our review has found that neither of these occupations imposes a normal minimum entry requirement of a bachelor's degree *in a specific field of study* as required by section 214(i)(1)(B) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

Nor do we find convincing counsel's citation to the Department of Labor's *Occupational Information Network (O\*NET™ Online)*. *O\*NET™ Online* is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a requirement for a given position, as *O\*NET™ Online*'s JobZone assignments make no mention of the specific field of study from which a degree must come. As was noted previously, USCIS interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position. With regard to the Specialized Vocational Preparation (SVP) rating, we note that an SVP rating is meant to indicate only the total number of years of vocational preparation required for a

particular position. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require.<sup>1</sup> Again, USCIS interprets the term “degree” in the criteria at

<sup>1</sup> Moreover, we note the following information from Section II of the *Dictionary of Occupational Titles*’ (DOT) Appendix C, Components of the Definition Trailer, available at <http://www.oalj.dol.gov/PUBLIC/DOT/REFERENCES/DOTAPPC.HTM> (last accessed December 21, 2011), which further addresses the SVP ratings system:

## II. SPECIFIC VOCATIONAL PREPARATION (SVP)

Specific Vocational Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.

This training may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

Specific vocational training includes training given in any of the following circumstances:

- a. Vocational education (high school; commercial or shop training; technical school; art school; and that part of college training which is organized around a specific vocational objective);
- b. Apprenticeship training (for apprenticeable jobs only);
- c. In-plant training (organized classroom study provided by an employer);
- d. On-the-job training (serving as learner or trainee on the job under the instruction of a qualified worker);
- e. Essential experience in other jobs (serving in less responsible jobs which lead to the higher grade job or serving in other jobs which qualify).

The following is an explanation of the various levels of specific vocational preparation:

Level	Time
1	Short demonstration only
2	Anything beyond short demonstration up to and including 1 month
3	Over 1 month up to and including 3 months
4	Over 3 months up to and including 6 months
5	Over 6 months up to and including 1 year
6	Over 1 year up to and including 2 years
7	Over 2 years up to and including 4 years
8	Over 4 years up to and including 10 years
9	Over 10 years

8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position. For all of these reasons, the *O\*NET™ Online* excerpt is of little evidentiary value to the issue presented on appeal.

As the evidence does not establish that the particular position proposed here is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, *in a specific specialty* closely related to the position's duties, the petitioner has not satisfied the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

We turn next to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The petitioner has not satisfied the first of the two alternative prongs at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proposed position; and (2) located in organizations that are similar to the petitioner.

Again, in determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

As already discussed, the petitioner has not established that its proposed position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree *in a specific specialty*. Nor has the petitioner submitted evidence that the industry's professional associations have made a degree in a specific specialty a minimum requirement for entry.

Finally, the petitioner's reliance upon the job vacancy advertisements is misplaced. First, it has not submitted any evidence to demonstrate that these advertisements are from companies "similar" to the

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Note: The levels of this scale are mutually exclusive and do not overlap.

Thus, even if the *DOT* assigns the proposed position an SVP rating of 8, which counsel asserts to be the case, that rating would not necessarily indicate that at least a four-year bachelor's degree is required, or more importantly, that such a degree must be in a specific specialty closely related to the requirements of that occupation. Therefore, the SVP rating is not probative of the proposed position being a specialty occupation.

petitioner. There is no evidence that the advertisers are similar to the petitioner in size, scope, and scale of operations, business efforts, and expenditures. Few of the advertisements state the size of the employer, and there is no evidence in the record as to how representative these advertisements are of the advertisers' usual recruiting and hiring practices. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). For all of these reasons, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).<sup>2</sup>

We also conclude that the record does not establish that the proposed position is a specialty occupation under the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." The evidence of record does not refute the *Handbook's* information to the effect that a bachelor's degree in a specific specialty, or its equivalent, is not the normal minimum entry requirement for sales manager or sales engineering positions. The record lacks sufficiently detailed information to distinguish the proposed position as unique from or more complex than similar positions that can be performed by persons without a specialty degree or its equivalent.

We turn next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires that the petitioner demonstrate that it normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet the third criterion, we normally review the petitioner's past employment practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas.<sup>3</sup>

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<sup>2</sup> According to the *Handbook's* detailed statistics on sales managers, there were approximately 346,900 persons employed as training and development specialists in 2008. *Handbook* at <http://www.bls.gov/oco/ocos020.htm>. There were 78,000 persons employed as sales engineers. *Id.* at <http://www.bls.gov/oco/ocos123.htm>. Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these few job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the proposed position required a bachelor's or higher degree *in a specific specialty* or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree *in a specific specialty* for entry into the occupation in the United States.

<sup>3</sup> Even if a petitioner believes or otherwise asserts that a proposed position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a

In order to establish its eligibility under the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the petitioner submitted information indicating that the individual who previously held the position offered to the beneficiary possesses a bachelor's degree in communications, and that individuals holding similar positions possess various types of degrees in linguistics, engineering, international business, exercise and sports science, public administration, fine arts, music and sound recording, English and journalism, recoding arts, and film science and video editing. However, this information does not establish the petitioner's eligibility under this criterion, as these degrees serve as further evidence that possession of a degree from any wide variety of fields would qualify a candidate for the position proposed here: communications, linguistics, engineering, international business, exercise and sports science, public administration, fine arts, music and sound recording, English and journalism, recoding arts, and film science and video editing do not constitute a single, specialized course of study. The petitioner has not established that the proposed position qualifies for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), requires the petitioner to establish that the nature of its proposed position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specialty. As previously discussed, the *Handbook* indicates that a baccalaureate degree in a specific specialty, or its equivalent, is not a normal minimum entry requirement. The petitioner has failed to differentiate the duties of the proposed position from those performed by sales managers and sales engineers who do not possess a degree from a specific specialty and, as such, has failed to indicate the specialization and complexity required by this criterion. As a result, the record fails to establish that the proposed position meets the specialized and complex threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Nor do the unpublished AAO decisions cited by counsel establish the proposed position as a specialty occupation under any of the statutory and regulatory criteria set forth above. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The proposed position does not qualify for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1)-(4), and this petition was properly denied.

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bachelor's degree could be brought to the United States to perform any job so long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proposed position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation"). Here, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

*The Petitioner Has Not Demonstrated That The Petition Is Supported By An LCA Which Corresponds To It*

Beyond the decision of the director, we note that the certified LCA provided in support of the instant petition lists a Level II prevailing wage level. This indicates that the LCA, which is certified for a “qualified” position, is at odds with the statements by counsel and the petitioner regarding the complexity of the duties to be performed by the beneficiary. In particular, we note counsel’s November 29, 2009 assertion that in the proposed position the beneficiary “requires only nominal supervision.” However, according to guidance regarding wage level determination issued by the Department of Labor (DOL) in 2009 entitled *Prevailing Wage Determination Policy Guidance*, at page 7,<sup>4</sup> Level II wage rates, which are labeled as “qualified,” are assigned to job offers for qualified employees (as opposed to Level III “experienced” employees or Level IV “fully competent” employees) who “perform moderately complex tasks that require limited judgment.” If the statements by counsel and the petitioner regarding the purported complexity of the duties of the proposed position are taken at face value, it is unclear how the beneficiary would be considered to be performing only “moderately complex” tasks whose performance requires only the exertion of “limited judgment.” Given the assertions by counsel and the petitioner, and the fact that the LCA submitted in support of the petition is for a Level II wage, it is therefore unclear how the LCA corresponds to the proposed petition.

While the DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part, the following:

For H-1B visas . . . DHS accepts the employer’s petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

(Italics added). The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has not demonstrated that the petition is supported by an LCA which corresponds to the petition, and the petition must be denied for this additional reason.

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<sup>4</sup> This document is available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf) (last accessed December 21, 2011).

*The Record Does Not Demonstrate That The Beneficiary Is Qualified To Perform the Duties of a Specialty Occupation*

Beyond the decision of the director, the petition may not be approved for an additional reason, as the petitioner has failed to demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation. The statutory and regulatory framework that the AAO must apply in its consideration of the evidence of the beneficiary's qualification to serve in a specialty occupation is set forth below.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C)
  - (i) experience in the specialty equivalent to the completion of such degree, and
  - (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

As the beneficiary did not earn a baccalaureate or higher degree from an accredited college or university in the United States, he does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(1). As he does not possess a foreign degree that has been determined to be equivalent to a baccalaureate or higher degree from an accredited college or university in the United States, he does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(2).<sup>5</sup> As the petitioner has not demonstrated that the beneficiary holds an unrestricted state license, registration or certification to perform the duties of a specialty occupation, he does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(3).

The petitioner, therefore, must establish that the beneficiary qualifies to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), which requires a demonstration that the beneficiary's education, specialized training, and/or progressively responsible experience is equivalent to the completion of a United States baccalaureate or higher degree in the specialty occupation, and that the beneficiary also has recognition of that expertise in the specialty through progressively responsible positions directly related to the specialty. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating a beneficiary's credentials to a United States baccalaureate or higher degree under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) is determined by at least one of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;<sup>6</sup>
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of

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<sup>5</sup> The credentials evaluation submitted by the petitioner purports to evaluate both the beneficiary's education as well as his work experience. However, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C)(2) does not pertain to work experience.

<sup>6</sup> The petitioner should note that, in accordance with this provision, the AAO will accept a credentials evaluation service's evaluation of *education only*, not experience.

education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The beneficiary does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). Although the record contains an evaluation addressing the beneficiary's work experience, the evaluation does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) because the petitioner has submitted no evidence establishing that the evaluator, [REDACTED], possesses the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience as required by that regulation.

No evidence has been submitted to establish, nor does the petitioner assert, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(2), which requires submission of the results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI).

Nor does the beneficiary qualify under 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). As was the case under 8 C.F.R. §§ 214.2(h)(4)(iii)(C)(1) and (2), the beneficiary is unqualified under this criterion because he did not earn a baccalaureate or higher degree from an accredited college or university in the United States and does not possess a foreign degree that has been determined to be equivalent to a baccalaureate or higher degree from an accredited college or university in the United States.

No evidence has been submitted to establish, nor does the petitioner assert, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(4), which requires that the beneficiary submit evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in a specialty.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) states the following with regard to analyzing an alien's qualifications:

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two

recognized authorities in the same specialty occupation;<sup>7</sup>

- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Although the record contains information regarding the beneficiary's work history, it does not establish that this work experience included the theoretical and practical application of specialized knowledge; that it was gained while working with peers, supervisors, or subordinates who held a bachelor's degree or its equivalent in the field; and that the beneficiary achieved recognition of expertise in the field as evidenced by at least one of the five types of documentation delineated in 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(5)(i)-(v).

Accordingly, the beneficiary does not qualify under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(5)(i)-(v) and therefore does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4). As such, the petitioner has failed to establish that the beneficiary qualifies to perform the duties of a specialty occupation. For this additional reason, the petition may not be approved.

### *Conclusion*

The petitioner has failed to demonstrate to demonstrate that its proposed position qualifies for classification as a specialty occupation. Beyond the decision of the director, we find additionally that the petitioner has failed to demonstrate: (1) that the petition is supported by an LCA which corresponds to it; and (2) that the beneficiary qualifies to perform the duties of the specific position proposed by the petitioner.<sup>8</sup> Accordingly, the beneficiary is ineligible for nonimmigrant classification under section 101(a)(15)(H)(i)(b) of the Act and this petition must remain denied.

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<sup>7</sup> *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. See 8 C.F.R. § 214.2(h)(4)(ii).

<sup>8</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d

The petition will remain denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met and the appeal will be dismissed.

**ORDER:** The appeal is dismissed. The petition remains denied.